



CLOSED CASE SUMMARY

ISSUED DATE: SEPTEMBER 29, 2021

FROM: DIRECTOR ANDREW MYERBERG
OFFICE OF POLICE ACCOUNTABILITY

CASE NUMBER: 2021OPA-0370

Allegations of Misconduct & Director's Findings

Named Employee #1

Allegation(s):		Director's Findings
# 1	8.200 – Using Force 1. Use of Force: When Authorized	Sustained
# 2	8.100 – De-Escalation 1. When Safe, Feasible, and Without Compromising Law Enforcement Priorities, Officers Will Use De-Escalation Tactics in Order to Reduce the Need for Force...	Not Sustained (Training Referral)

Imposed Discipline

Written Reprimand

This Closed Case Summary (CCS) represents the opinion of the OPA Director regarding the misconduct alleged and therefore sections are written in the first person.

EXECUTIVE SUMMARY:

The Force Review Board alleged that the Named Employee may have used excessive force and may have failed to de-escalate.

SUMMARY OF INVESTIGATION:

On the date in question, Named Employee #1 (NE#1) – who was assigned as a Field Training Officer (FTO) – was on patrol with a student officer – Witness Employee #1 (WO#1). At the time, WO#1 was beginning his second day in his first student rotation. This is described by the Field Training program as a “limbo day,” which is defined as “a period of observation by the student officer to become acclimated to the precinct, watch and FTO expectations...[and] an opportunity to observe, ask questions, and get an explanation of the calls they respond to.” The Field Training program further noted that: “Student officers can assist with calls, but the main responsibility of workload falls on the FTO.” NE#1 confirmed that he did not consider WO#1 to be his partner on that day because of WO#1’s status. Both NE#1’s chain of command and WO#1 affirmed that NE#1 and WO#1 were considered a one officer car.

The officers were dispatched were dispatched to an assault in progress, in which it was reported that a male was hitting a female. Another unit was also dispatched. Radio broadcasted that the male had a flashlight. NE#1 and WO#1 arrived in the vicinity.

At that time, NE#1 made contact with the female. She pointed at the male and said that he assaulted her. Approximately seven seconds thereafter, the male ran. He was chased by WO#1, who was able to catch up to him. WO#1 grabbed the male’s arms. The male was moving around at the time. While the male was standing with WO#1, the male’s pants fell down. Around three to four seconds later, NE#1 caught up to the male and WO#1. NE#1 subsequently punched the male once in the head. The officers then placed the male into custody. At this time, there were no other backing units present.



In his use of force report, NE#1 wrote that he punched the male because the male was “violently” pushing and pulling his body back and forth to get away from WO#1. He believed that this force was appropriate under the circumstances.

The force was later reviewed by the FRB. The FRB determined that the force violated policy and that NE#1 failed to de-escalate when he made contact with the male without a backing officer present. The FRB referred these matters to OPA, and this investigation ensued.

At his OPA interview, WO#1 described chasing the male and seeing the male drop something. However, WO#1 did not know what that was. WO#1 did not observe the male possessing any weapons. WO#1 told OPA that, in his opinion, the male was “passively” pulling away from him. That being said, he felt that he did not have full control over the male, that the male was non-compliant, and that the male could have harmed him, especially if the male was armed. WO#1 stated that he did not see NE#1’s punch.

NE#1 acknowledged that, after watching the Body Worn Video (BWV), it was not consistent with what he recalled perceiving at the time. He reiterated that he perceived the male pulling away violently, even if this was not reflected on the BWV. NE#1 stated that, because of his perception, he punched the male on the side of the head using 50% power and that he used his bodyweight to take the male to the ground. NE#1, like WO#1, did not see the male’s pants fall to the ground. NE#1 explained that his intention was to disorient the male, take him to the ground, and place him into custody. NE#1 believed that the force he used was consistent with policy. NE#1 asserted that his use of force was necessary because WO#1 caught up to a fleeing felony assault suspect, did not know what to do, and it was the most viable option to bring the situation to a safe completion. NE#1 believed that his use of force was proportional because of his perception of the male’s “violent pushing and pulling.”

ANALYSIS AND CONCLUSIONS:

Named Employee #1 - Allegation #1

8.200 – Using Force 1. Use of Force: When Authorized

SPD Policy 8.200(1) requires that force used by officers be reasonable, necessary and proportional. Whether force is reasonable depends “on the totality of the circumstances” known to the officers at the time of the force and must be balanced against “the rights of the subject, in light of the circumstances surrounding the event.” (SPD Policy 8.200(1).) The policy lists a number of factors that should be weighed when evaluating reasonableness. (*See id.*) Force is necessary where “no reasonably effective alternative appears to exist, and only then to the degree which is reasonable to effect a lawful purpose.” (*Id.*) Lastly, the force used must be proportional to the threat posed to the officer. (*Id.*)

In assessing NE#1’s use of force, OPA concurs with the FRB that it was inconsistent with policy. OPA believes that it was not reasonable, necessary, or proportional under the circumstances. With regard to both reasonableness and necessity, the fundamental question is what the need was to use force at the time and, specifically, a punch. In assessing these elements, OPA is required to apply a reasonable officer standard. This involves an analysis of whether a reasonable officer in NE#1’s place would have perceived the same level of threat and deemed a punch appropriate. OPA concludes that a reasonable officer would not have done so. Most notably, the video clearly shows that the male was not “violently” resisting or pulling away from WO#1. No reasonable officer could have determined that this was the case under the circumstances and, indeed, WO#1 (the only other officer on scene) more accurately described the male’s actions as “passive.” While OPA recognizes that officers need to make decisions quickly, this does not justify decision-making based on perceived facts that in no way comport with the objective evidence. In addition, and given that the threat level posed by the male was low at the time, there were a number of other force options available to NE#1, all of which were less intrusive than a punch.



The force was further not proportional. While both NE#1 and WO#1 were entitled to use some force to take custody of the male and to secure him, that force was required to be commensurate with the threat he posed. Here, the BWV conclusively established that the threat presented by the male was minor. Based on that threat level, the punch was excessive and not proportional.

For these reasons, OPA recommends that this allegation be Sustained.

Recommended Finding: **Sustained**

Named Employee #1 - Allegation #2

8.100 – De-Escalation 1. When Safe, Feasible, and Without Compromising Law Enforcement Priorities, Officers Will Use De-Escalation Tactics in Order to Reduce the Need for Force...

“De-escalation tactics and techniques are actions used by officers, when safe and without compromising law enforcement priorities, that seek to minimize the likelihood of the need to use force during an incident and increase the likelihood of voluntary compliance.” (SPD Policy 8.100-POL)

The policy further instructs that: “When safe and feasible under the totality of circumstances, officers shall attempt to slow down or stabilize the situation so that more time, options and resources are available for incident resolution.” (SPD Policy 8.100-POL-1) Officers are also required, “when time and circumstances permit,” to “consider whether a subject’s lack of compliance is a deliberate attempt to resist or an inability to comply based on factors” such as “mental impairment...drug interaction...[and/or] behavioral crisis.” (*Id.*) These mental and behavioral factors should be balanced by the officer against the facts of the incident “when deciding which tactical options are the most appropriate to bring the situation to a safe resolution.” (*Id.*)

De-escalation is inarguably a crucial component of the Department’s obligations under the Consent Decree; however, it is not purposed to act as an absolute bar to enforcing the law when necessary. That being said, where officers fail to fully de-escalate and instead act in a manner that increases the need for force and the level of force used, such conduct is inconsistent with the Department’s policy and expectations.

The BWV indicated that, prior to arriving on scene and making contact with the male, NE#1 and WO#1 did not discuss their planned approach to this incident and the tactics they would use. When the female identified the male as the perpetrator and he then ran, WO#1 made the decision to engage in a foot pursuit. NE#1 followed, eventually catching up with them. At that time, WO#1 was holding onto the male who was non-compliant. Once NE#1 arrived to where WO#1 was, force was already being used by WO#1 to control the male. NE#1 was also permitted to use force – albeit not the punch he employed – to assist in taking the male into custody. He was not required to engage in de-escalation at that time.

Given this, OPA does not believe that NE#1 failed to de-escalate and that, instead, he reacted to WO#1’s actions. However, OPA does find that he would benefit from retraining and counseling on his failure to engage in tactical planning prior to his and WO#1’s arrival on scene – particularly given his status as an FTO – and the fact that he did not take sufficient steps to slow the incident down prior to the foot pursuit occurring, including to allow another non-student officer to respond. Accordingly, OPA recommends that this allegation be Not Sustained – Training Referral.

- **Training Referral:** NE#1’s chain of command should counsel him concerning the shortcomings of his de-escalation in this matter. This should include a discussion of the issues identified by OPA, as well as the concerns raised by the FRB. The chain of command should also ensure that NE#1 receives whatever retraining



is necessary, including utilizing the Training Unit if needed. This counseling and any retraining should be documented in an appropriate database

Recommended Finding: **Not Sustained (Training Referral)**